Office-Supreme Court, U.S.
FILED
SEP 1 19
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1962

No. 280

JOSEPH VOGELSANG and GEORGE SCHMITS, co-partners doing business under the firm name and style of WHITEHOUSE BROS.,

Petitioners,

against

DELTA AIR LINES, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

SIMON GREENHILL,
JOHN M. SPEYER,
Counsel for Petitioners.

Supreme Court of the United States

October Term, 1962

No. 280

JOSEPH VOGELSANG and GEORGE SCHMITS, co-partners doing business under the firm name and style of WHITEHOUSE BROS.,

Petitioners,

against

DELTA AIR LINES, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

POINT I

Respondent's introduction of petitioners' insurance is new matter which is not only immaterial but designed to becloud the real issues in the case.

This memorandum is impelled by respondent's introduction of new matter in the Brief in Opposition.

Respondent has, before this Court, for the first time in this litigation injected the issue of petitioners' insurance (Br. Op. 4). No defense of improper party plaintiff was ever interposed; respondent's motion for summary judgment as well as their briefs in the District Court and Court of Appeals were silent on the subject; and the opinions below did not consider insurance or any aspect thereof. Under the circumstances petitioners could not anticipate the argument in preparing their petition, and can only wonder whether, and why, it is now seriously urged.

Respondent is undoubtedly aware of the execution of a loan agreement since reference thereto was made on the very page of Schmits' deposition, cited by it (p. 71, Pl.'s Ex. 3). The purpose of such an arrangement is to put the insured promptly in funds to the full extent to which he is entitled, while at the same time preserving to his insurers the complete and precise right of the insured to proceed against the carrier. This Court long ago recognized and approved agreements of this nature (*Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139). The rationale of the rule was succinctly stated by Mr. Justice Brandeis (pp. 148-9):

> "The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. Such claims, like tangible salvage, are elements which enter into the calculations of actuaries in fixing insurance rates; and, at least in the mutual companies, the insured gets some benefit from amounts realized therefrom."

Respondent contends that petitioners did not rely upon, or pay, for "the protection which would have been afforded by the declaration of a higher value to the air carrier". (p. 4). Implicit in this argument is the assumption, also indulged in by the Court of Appeals (Petition, p. 24), that a declared valuation of $69,275.87, the amount sued for, could have been made by petitioners. While the full tariff has not been printed and is not before this Court, it should be noted that such an assumption is wholly unsupported by the applicable tariff for, by Rule 71 (C), the respondent was not empowered to accept a declared valuation in excess of $5,000.00. Respondent's argument would surely have been the same had the petitioners declared the maximum tariff valuation of $5,000.00. Thus it is clear that respondent's argument that the petitioners could have protected themselves under the tariff by declaring and paying for the full (or even substantial) value of the jewelry is

without merit. More important, respondent's basic argument, when scrutinized, amounts to a declaration that *a passenger is required to purchase protection from the carrier against that carrier's own wanton or wilful misconduct*, a concept to which, we submit, this Court should refuse to subscribe.

Petitioners' property was entitled to receive the same care and protection, and Delta's wanton or wilful misconduct which caused the loss was no less reprehensible, whether petitioners were insured or not. The true basis for limiting liability where no higher valuation is declared is estoppel (*American Ry. Exp. Co.* v. *Lindenburg*, 260 U. S. 584), but the law will not permit estoppel to be used as a shield in the hands of a carrier which is guilty of wanton or wilful misconduct, regardless of insurance.

Respondent's steadfast position, until its present Brief in Opposition, was that the limitation applied *regardless of wanton or wilful misconduct*. Respondent now argues that its actions do not constitute such misconduct, thus raising the precise issue which petitioners have consistently maintained requires a jury determination. We suggest that before this Court respondent is no longer willing to urge its previous harsh theory which relieves it from the consequences of its own affirmative acts of wrongdoing. The introduction of new and irrelevant matter appears calculated to disguise its basic change in position and to becloud the true issues in this case. We respectfully submit that this Court will grasp the true issues and grant certiorari.

Respectfully submitted,

SIMON GREENHILL,
JOHN M. SPEYER,
Counsel for Petitioners.